Public Utility Commission of Texas

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Pat Wood, III
Chairman

Robert W. Gee
Commissioner

Judy Walsh
Commissioner

September 25, 1996

Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

RE: CC Docket No. 96-98 (FCC 96-182)
In the Matter of Implementation of the
Local Competition Provisions in the
Telecommunications Act of 1996

To the Secretary:

Enclosed herewith for filing with the Commission are an original plus eleven copies of the Petition for Reconsideration of the Public Utility Commission of Texas in the above captioned matter. By a copy of this transmittal, we are also providing an electronic copy of the filing as requested.

Please acknowledge receipt by affixing an appropriate notation on the duplicate copy of this letter furnished herewith for that purpose and returning same to the undersigned in the enclosed, self-addressed envelope.

Sincerely,

Vicki Oswalt

Vicki Oswalt
Director, Office of Policy Development

cc: ITS, Inc.
Ms. Janice Myles, Common Carrier Bureau

No. of Copies rec'd 0+10
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	§	
	§	
Implementation of the Local	§	**CC Docket No. 96-98**
Competition Provisions in the	§	
Telecommunications Act of 1996	§	

PETITION FOR RECONSIDERATION OF THE PUBLIC UTILITY COMMISSION OF TEXAS

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CONTENTS

Executive Summary

The Public Utility Commission of Texas (Texas PUC) herein respectfully requests that the Federal Communications Commission (Commission) clarify and/or reconsider certain aspects of its August 1, 1996 First Report and Order issued in docket. This executive summary identifies the specific requests of the Texas PUC.

The Texas PUC requests that the Commission provide additional guidance concerning the standard that the Commission will utilize to determine whether a state provision is "consistent with the Act and the Commission's rules". The Texas PUC requests that the Commission indicate that state provisions which merely provide additional options to carriers and do not prevent implementation of the Act or the Commission's rules should be viewed as consistent with the Act and the Commission's rules.

The Texas PUC requests that the Commission reconsider its assertion of authority, through its complaint jurisdiction, to review agreements approved by State commissions. State decisions in the arbitration and approval process should be subject to review by Federal district court in accordance with the Act.

The Texas PUC requests that the Commission clarify and/or reconsider its ruling concerning the ability of IXCs to obtain interconnection for interexchange

traffic, specifically addressing the possibility of bypass created by the Commission's ruling.

The Texas PUC requests that the Commission clarify and/or reconsider its ruling concerning the ability of states to impose additional obligations on non-incumbent LECs. The Texas PUC requests that the Commission indicate that states may impose additional obligations on non-incumbent LECs when the imposition of such obligations are needed to address legitimate state concerns like quality of service and the public interest.

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PETITION FOR RECONSIDERATION OF THE PUBLIC UTILITY COMMISSION OF TEXAS

I. INTRODUCTION

1. In its First Report and Order (Order)[1], adopted August 1, 1996, the Federal Communications Commission (Commission or FCC) established rules for the implementation of Sections 251 and 252 of the Telecommunications Act of 1996 (the Act)[2]. The Public Utility Commission of Texas (Texas PUC), which has general regulatory authority over telecommunications utilities within our jurisdiction in Texas, submits this petition for clarification and/or reconsideration of the Order to assist the Texas PUC in executing its duties under the Act and the Public Utility Regulatory Act of 1995 (PURA95)[3]. This petition is organized in accordance with the Table of Contents contained in the Order. The section headings and subsections

[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996).
[2] Pub. L. No. 104-104, 110 Stat. 56 (1996)(to be codified at 47 U.S.C. §§151, *et seq.*).
[3] Tex. Rev. Civ. Stat. Ann. art. 1446c-0, (Vernon Supp. 1996).

referenced in this petition indicate the portions of the Order at which the Commission discusses the issues involved.

2. In 1995, the 74th Texas Legislature passed PURA95, extensively revising the basis upon which telecommunications utilities are regulated in Texas and placing greater emphasis on competition, rather than monopoly service regulation, as the method by which just and reasonable rates for local exchange service are maintained. PURA95 also recognized that the same debate, concerning the role of competition in telecommunications regulation, was then pending in the United States Congress and that a different balance of competition and regulation would possibly be reflected in any legislation passed by Congress. For that reason, PURA95 contained provisions that required the Texas PUC to avoid conflicts with applicable federal law or rules.[4] PURA95 became effective on September 1, 1995 and the Texas PUC immediately began implementing the many pro-competitive aspects of PURA95.

3. On February 8, 1996, the Act became effective, providing additional impetus for the implementation of competition in the local exchange service market.

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[4] *See* PURA95 §1.404 (the provisions of this Act "shall be construed to apply so as not to conflict with any authority of the United States."); §3.452(a) (an incumbent LEC "shall, at a minimum, unbundle its network to the extent ordered by the Federal Communications Commission"); §3.455(a) (Texas PUC rules "may not be inconsistent with the rules and regulations of the Federal Communications Commission regarding telecommunications number portability."); §3.456(a) (Texas PUC shall adopt rules for expanded interconnection that "are consistent with the rules and regulations of the Federal Communications Commission relating to expanded interconnection"); §3.458(f) (for interconnection, the Texas PUC "may establish rules that are responsive to changes in federal law or developments in the local exchange market.")

As anticipated, the Act provides different answers to many of the issues considered by the Texas legislature in adopting PURA95. Since February 8, 1996, the Texas PUC has been faced with the responsibility of simultaneously implementing both PURA95 and the relevant provisions of the Act.

4. The Order concludes that sections 251 and 252 of the Act address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements and that these sections create parallel jurisdiction for the Commission and the states. (¶ 85). The FCC "concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition. The rules that the FCC establishes in this Report and Order are minimum requirements upon which the states may build." (¶ 24) The Texas PUC requests that the Commission provide additional guidance on the scope of the actions which it believes the states may take in implementing their portion of this parallel jurisdiction.

II. SCOPE OF THE COMMISSION'S RULES

A. Advantages and Disadvantages of National Rules; and
D. Commission's Legal Authority and the Adoption of National Pricing Rules

5. The Texas PUC requests that the Commission clarify the Order to indicate that state provisions which merely provide additional options to carriers and do not prevent implementation of the Act or the Commission's rules are viewed as consistent with the Act and the Commission's rules. As noted above, both the United States Congress and the Texas Legislature have adopted new laws regarding the introduction of competition into the local exchange market. Although there may be instances where the two statutes are in conflict, the Texas PUC believes that the two statutes may be harmonized so that their provisions may remain different but parallel, rather than conflicting or diverging. Consider the differences in resale provisions between the two parallel statutes. PURA95 says that the holders of certain types of certificates, but not others[5], may resell the ILEC's monthly recurring flat-rate local exchange service and feature services, such as tone dialing and custom calling features, at a 5 percent discount to the intrastate tariffed rate. This requirement is different from the resale provisions of the Order in two ways. First, the 5% discount in PURA95 does not address either the specific federal criteria for avoided cost studies in the Act or the interim default discount range (17-25%) established in the Order. Second, the discounted rate under the Act would be available to holders of all

[5] PURA95 §3.2532 allows the holder of a Service Provider Certificate of Operating Authority (SPCOA) to resell such services. A holder of a Certificate of Operating Authority (COA) under PURA95 §3.2531 may not resell flat-rated local exchange telephone service.

types of certificates. Therefore, the federal provisions offer more options than the state law.

6. PURA95 says that an SPCOA may purchase for resale optional extended area service (EAS) and expanded local calling (ELC), but not at a discount. According to the federal rules, an ILEC must establish a wholesale rate for each resale service that (1) meets the statutory definition of a "telecommunications service," and (2) is provided at retail to subscribers who are not "telecommunications carriers". EAS and ELC are telecommunications services and therefore, under the Order, must be offered by ILECs at a discount wholesale rate. Unless the avoided cost of offering these services at wholesale is zero, there is a difference between the federal and state provisions applicable to these services.

7. As another example, PURA95 §3.453(a) requires Southwestern Bell, GTE, other ILECs electing incentive regulation, and any other ILEC with a COA or SPCOA holder in its territory, to file a "usage sensitive loop resale tariff." PURA95 §3.453(c) says the PUC "may only approve a usage sensitive rate..." for such a tariff. In contrast, the FCC concludes that "as a general rule, ... incumbent LECs' rates for interconnection must recover costs in a manner that reflects the way they are incurred," thereby conforming to the Act's requirement that rates be cost-based. Among other things, the FCC requires "that the charges for dedicated facilities be flat-rated, including...charges for *unbundled loops*, dedicated transport,

interconnection, and collocation. These charges should be assessed for fixed periods, such as a month." (emphasis supplied). (¶744)

8. Consistent with the legislative directives of PURA95 and with constitutional law principles of preemption, the Texas PUC has sought to harmonize PURA95 with the Act whenever possible, but also has acknowledged that it may not enforce state provisions if they are found to be in violation of federal law. *Application of Southwestern Bell Tel. Co. , et. al., for Approval of Flat-rated Local Exchange Resale Tariffs*, PUCT Docket No. 14658, Order Addressing Certified Issues, April 10, 1996. The Texas PUC's decisions have created separate parallel options which may be pursued by telecommunications carriers. For example, in the flat-rated resale situation cited above, an eligible carrier may seek to purchase the flat-rated local exchange service at the 5 percent discount allowed by PURA95. Carriers who are ineligible for the 5 percent discount under state law, or carriers who believe they can negotiate a more favorable rate, are free to pursue such action through negotiation and arbitration under the Act. Thus, the existence of the 5 percent discounted flat-rated local exchange service merely presents an additional option available to some carriers under the intrastate tariffs. Similarly, the existence of a usage-sensitive loop resale tariff under state law does not prevent the implementation of a flat-rated unbundled loop as required by the Order, it is merely an additional option available to carriers.

9. The Order indicates that some state requirements will not be consistent with the Act and the Commission's rules and that "(i)t will be necessary in those instances for the subject states to amend their rules and alter their decisions to conform to our rules." (Para. 62). The Order is not clear concerning when state requirements will be found to be not consistent with the Act and the Commission's rules. The Order, in some instances, seems to contemplate that consistency with the Commission's rules requires that states comply with those rules, while in other instances, consistency is viewed as a lack of explicit conflict with the rules. The Texas PUC submits that, if states are to exercise their parallel jurisdiction under the Act, they should be able to also implement any provisions of state law that do not expressly contradict the Commission's rules. As long as the state provisions do not prevent the implementation of the Act or the Commission's rules, the state provisions can co-exist with the federal provisions, providing additional options that the state has determined should be available to enhance competition or protect the public interest in that state. The Texas PUC requests that the Commission clarify the Order to indicate that state provisions which merely provide additional options to carriers and do not prevent implementation of the Act or the Commission's rules are viewed as consistent with the Act and the Commission's rules.[6]

[6] The PURA95 provisions discussed in this section of the petition are also the subject of petitions for declaratory ruling and/or preemption under section 253 of the Act. *In the matter of Consolidated Petitions for Declaratory Rulings Regarding Preemption of Texas Law*, CCBPol 96-14. The Texas PUC understands that decisions concerning whether the specific PURA95 provisions should be upheld or preempted will be made in that proceeding and the Texas PUC is not attempting to raise those preemption issues in this petition. The Texas PUC is merely seeking clarification concerning the standard that the Commission will use to determine that a state provision is "not consistent with the Act and the Commission's rules."

E. Authority to Take Enforcement Action

10. The Order indicates that an aggrieved party could invoke the Commission's section 208 jurisdiction by filing a complaint "alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission." (¶ 127) By taking such a position, the Commission is essentially granting to itself the authority to review and set aside state decisions in arbitration proceedings. The Commission bases this position upon its review of sections 252(e)(5) and (6), concluding that "federal court review is not the exclusive remedy regarding such determinations under section 252." The Commission reasons that the use of the word "may" in section 252(e)(6) indicates that Congress did not intend that federal courts have exclusive jurisdiction.

11. The Texas PUC requests reconsideration of this point. The Texas PUC believes that the Commission has placed too great an emphasis on the use of the word "may" in section 252(e)(6). The section provides, "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination *may* bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." (emphasis added) The Texas PUC believes that this language must

be read as making the decision of whether or not to appeal a choice by the aggrieved party. By using the permissive term "may", Congress was indicating that judicial review of the decision was not a prerequisite to implementation of the arbitration decision. The word "may" should not be read as giving the aggrieved party the choice of which forum to utilize for an appeal, or giving the aggrieved party the option to later seek an appeal in the guise of a section 208 complaint. Adopting the Order's interpretation of section 252(e)(6) as being a non-exclusive grant of jurisdiction to the "appropriate Federal district court" would mean that a State district court could assert jurisdiction over an appeal of the action of the State regulatory body, to the same extent that it has jurisdiction over other decisions of the State regulatory body. While the Texas PUC has confidence that State district courts are qualified to handle such appeals, this result does not conform to the Act's overall structure and goals which seem to contemplate Federal appellate procedure. Further, if the Commission retains complaint jurisdiction over the arbitration decisions, then the State regulatory body would also retain complaint jurisdiction under State law and could subsequently reach a different determination on the arbitration proceeding in a complaint case decided well after the end of the initial nine-month period allotted for State action. The possibility of subsequent administrative decisions undermining a state-approved arbitration agreement would also inject an unnecessary element of risk for the parties because they would never know when the arbitration agreement was "final" and could be relied upon. The Texas PUC does not believe that these results

were intended by Congress, but they are the logical result of application of the meaning given to the word "may" in the Order.

12. The Texas PUC believes that its interpretation of section 252(e)(6) is consistent with other provisions of the Communications Act of 1934. For example, section 402(b) provides that: "Appeals *may* be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases..." Adopting the Commission's interpretation of the word "may" in the Order would mean that the jurisdiction of the United States Court of Appeals for the District of Columbia is not exclusive for the identified cases in section 402. An aggrieved person could presumably appeal such decisions to any other Court of Appeals, or indeed to any other court in any jurisdiction, or to the Commission itself.

13. Accordingly, the Texas PUC requests that the Commission reconsider its assertion of authority, through its complaint jurisdiction, to review agreements approved by State commissions. State decisions in the arbitration and approval process should be subject to review by Federal district court in accordance with the Act. Although the Commission may retain complaint jurisdiction to determine ILEC compliance with the requirements of sections 251 and 252, such jurisdiction does not include the ability to require a different result "if the carrier is in compliance with an agreement approved by the state commission." Without the ability to reach final and

enforceable resolution of issues in arbitration and approval proceedings, the states' ability to participate in the parallel jurisdiction will be impaired.

IV. INTERCONNECTION

D. Interexchange Service is Not Telephone Exchange Service or Exchange Access Service

14. The Order concludes that section 251(c)(2) limits the obligation to provide interconnection if the purpose of the interconnection is for the transmission and routing of "telephone exchange service" *or* "exchange access", and that interexchange service does not constitute either "telephone exchange service" or "exchange access". (¶ 191) However, an IXC that offers access services to other carriers as well as itself would be engaged in "exchange access", and is entitled to obtain interconnection under section 251. The Texas PUC is concerned that, by interpreting the statute's "and" as an "or", the Commission may have created a new vehicle by which IXCs can bypass the payment of access charges.

15. The Order seems clear that the Commission did not intend that interconnection and unbundling under section 251 be used as a substitute for origination or termination of interexchange traffic. Under the Order's interpretation of section 251 an IXC could obtain interconnection for originating and terminating its own traffic simply by offering access service to competing carriers. It could

accomplish such an "offer" by establishing a tariff to provide such service. Since the IXC would not be subject to the obligations imposed on ILECs by section 251(c)(2), the terms and conditions of such tariff could be structured so that no other carrier would be interested in ordering such service. The IXC could also obtain unbundling of the ILEC's transport, switching and loop elements to create its own originating and terminating "access" service for its interexchange traffic. The IXC would thereby be able to obtain interconnection and unbundling solely for its own originating and terminating interexchange traffic, in contravention of the Order's intent.

16. The Texas PUC believes that, if the Commission intends that IXCs have this ability to bypass access, the Order should be more explicit on this point. If the Commission does not intend such a result, it should revise the Order before this door is opened. The Texas PUC suggests that the statutory language should be applied as drafted, in order to avoid the possibility of additional access bypass. Section 251(c)(2) specifically provides that interconnection is supposed to be for "telephone exchange service *and* exchange access". (emphasis added) By interpreting the word "and" to be "or", the Commission has created the opportunity for bypass described above. The Texas PUC is concerned with the possible effect of additional access bypass at this time, particularly when the Commission is working to address access charge reform. The Texas PUC agrees with the Commission that access charge reform should be addressed at the same time as universal service funding, and not by the piecemeal creation of additional bypass opportunities. If IXCs were

required to provide both telephone exchange service and exchange access in order to obtain interconnection, the Commission would at least be encouraging the entry of yet another carrier into the local market to address universal service concerns. The Texas PUC believes that both the letter and the spirit of the law are best served by requiring the interconnector to provide both "telephone exchange service" *and* "exchange access".

17. The Texas PUC requests that the Commission clarify its ruling concerning the ability of IXCs to obtain interconnection for interexchange traffic, specifically addressing the bypass opportunity outlined above.

XI. OBLIGATION IMPOSED ON LECS BY 251(B)

C. Imposing additional obligations on LECs

18. The Order concludes that states may not impose the same obligation on non-incumbent LECs that the Act specifically imposes on ILECs. (¶ 1247) The Order recognizes that the Act explicitly allows states to impose additional obligations in certain instances, but rules that such obligations "must be consistent with the language and purposes of the 1996 Act." The Order also permits interested persons to ask the Commission to issue an order declaring that a particular LEC should be

treated as an incumbent LEC, before the ILEC obligations may be imposed on the non-incumbent LEC.

19. A strict reading of the Order's limitations on a state's ability to impose additional obligations on non-incumbent LECs could prohibit the implementation of two provisions of Texas law, even though those provisions are otherwise consistent with the Act. First, PURA95 §3.458 and P.U.C. Subst. R §23.97 (the Texas Interconnection Rule) require all "providers of telecommunications services to maintain interoperable networks" and establish the terms and conditions by which all providers may enter into interconnection agreements. Second, PURA95 §3.453 imposes on a non-incumbent LEC the obligation "to permit local exchange companies to resell its existing loop facilities at its regularly published rates if the local exchange company has no loop facilities and has a request for service." The Texas PUC believes that both of these state statutory obligations are appropriate for all carriers in that they were established to provide for "the improvement of telecommunications in the state"[7] and assure quality of service for the consumers in the state. The Texas PUC believes that both requirements are clearly supported by section 253(b) of the Act and should not be viewed as inconsistent with the Act.

20. Since PURA95 became effective, the Texas PUC has issued many certificates to new local service providers in Texas. An example based upon one of

[7] PURA95 §3.451.

these new carriers may illustrate the need for the PURA95 requirements described above. On December 6, 1995, the Texas PUC issued a COA to Kingsgate Telephone Company (Kingsgate). Kingsgate proposed to serve an area of approximately 30 square miles in suburban Houston. Although the area was certificated to Southwestern Bell Telephone Company (SWBT), there were very few local telephone facilities in the area because it was undeveloped. Kingsgate, which is affiliated with the company that is now developing the area, intends to install facilities in the area as the proposed subdivision grows, including providing all of the loop facilities to connect with each of the end users in the development. If a customer in the Kingsgate area wanted to receive service from SWBT, SWBT would probably need to resell Kingsgate's existing loop facilities in order to provide service to that customer because SWBT has no loop facilities in that area. Similarly, other non-incumbent certificated carriers who are authorized to serve the area would need to enter into interconnection agreements with Kingsgate in order to terminate traffic to Kingsgate's customers. PURA95's requirement that all providers maintain interoperable networks would facilitate such agreements. By enforcing the PURA95 requirements, the Texas PUC would be advancing universal service, ensuring the quality of service to the end user, and safeguarding the rights of the consumer to choose from among the various carriers who are authorized to provide service.

21. Concerning PURA95 §3.458 and the Interconnection Rule, the Texas PUC believes that the goals of those provisions are consistent with the

interconnection requirements imposed on all carriers in section 251(a) of the Act and the resale, dialing parity, access to rights-of-way, and compensation provisions applicable to LECs under section 251(b) of the Act. Although PURA95 and the Interconnection Rule may go beyond the express language of section 251(a) and (b), the Texas PUC believes that the rule's requirements neither create a conflict with section 251(c) nor impose unreasonable burdens on non-incumbent LECs.

22. Although the Texas PUC could seek a ruling from the Commission declaring that a particular non-incumbent LEC should be treated as an ILEC, the Texas PUC does not believe that such an approach is appropriate, effective, or cost-effective for the two provisions discussed above. The Commission has indicated that the showing required to obtain such a ruling will be high, and it is likely that the LEC would contest such designation, given the additional obligations that would apply as a result of such designation. Having the LEC declared to be an ILEC for all purposes under section 251(c) is not necessary to carry out the more limited obligations imposed by PURA95 §3.458 and the Interconnection Rule. It would be a better use of resources if LECs could be subject to treatment as ILECs for limited purposes, as contemplated by the Interconnection Rule, rather than having them subject to all of the obligations imposed by section 251(c). The declaratory action contemplated by the Order would also be ineffective in the circumstances described in PURA95 §3.453 (the loop resale provision). In order to impose a resale obligation on a non-incumbent LEC, the requesting LEC must have no facilities available and must be

responding to a request for service. If the ILEC has to first seek to have the LEC declared to be an ILEC, it is quite likely that the request for service will be withdrawn before a ruling could be obtained. Therefore, in the limited situations described above, the Texas PUC believes that the public interest in general, and the end user customer in particular, are best served by allowing these state provisions to be imposed on all providers.

23. The Texas PUC seeks clarification/reconsideration of the Order to indicate that states may impose additional obligations on non-incumbent LECs when the imposition of such obligations are needed to address legitimate state concerns like quality of service and the public interest.

Respectfully submitted,

Public Utility Commission of Texas
7800 Shoal Creek Blvd.
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